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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID SANCHEZ,

Defendant and Appellant.

G051395

(Super. Ct. No. 10NF0172)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted David Sanchez of attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a); all further statutory references are to the Penal Code) and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found several enhancement allegations applied, including that Sanchez inflicted great bodily injury (GBI) on the victim (§ 12022.7, subd. (a)), personally used a deadly weapon (§ 12022, subd. (b)(1)), and attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced Sanchez to a 23-year prison term, consisting of a nine-year upper term for attempted murder and consecutive terms of three years, 10 years, and an additional year for, respectively, the GBI, gang benefit, and use of a deadly weapon enhancements; the court stayed the gang conviction under section 654.

Sanchez contends the trial court erred in declining to suppress statements he made in a police interrogation when the court concluded he did not unequivocally invoke his right to silence under *Miranda v. Arizona* (1966) 384 U.S. 436, but instead, on clarification by the detective, only intended to shut down questioning on his alleged gang involvement. He also argues resentencing is necessary because the trial court did not realize an enhanced sentence for the jury's GBI finding was discretionary rather than mandatory. As we explain, these contentions do not require reversal of the judgment or resentencing, and we therefore affirm.

I

FACTUAL BACKGROUND

Because the facts concerning the offense have little bearing on defendant's appellate argument, we set them out only briefly. Defendant and at least one other Westside gang member confronted Jesus Castaneda in the alley behind defendant's mother's home. Defendant issued a gang challenge, demanding to know Castaneda's gang affiliation, and when Castaneda ignored it, defendant stabbed him and defendant's cohort joined in the attack. Castaneda suffered catastrophic injuries from 17 stab

wounds, including two punctured lungs and a severed spinal cord that left his legs paralyzed.

According to defendant, Castaneda had been acting "crazy," threatened to shoot defendant's family, "start[ing] with [defendant and] then go one by one after that," and defendant only stabbed him in a heat of passion arising from the quarrel or imperfect self-defense when Castaneda said he was going home to get a gun to carry out his threat.

II

DISCUSSION

A. *No* Miranda *Violation*

1. Defendant's Claim, Governing Principles, and Standard of Review

Defendant contends the police officers who interrogated him violated his Fifth Amendment right to avoid self-incrimination by continuing to question him after he invoked his right to silence. He does not dispute he validly waived his *Miranda* rights at the outset of the interview, including the right to silence. This distinction is critical because "[d]etermining the validity of a *Miranda* rights **waiver** requires 'an evaluation of the defendant's state of mind'" to ascertain whether his or her "waiver was knowing, intelligent, and voluntary." (*People v. Nelson* (2012) 53 Cal.4th 367, 375 (*Nelson*), boldface added.) In contrast, the asserted **invocation** of one's *Miranda* rights *after* having validly waived them triggers a different analytic framework. (See *Smith v. Illinois* (1984) 469 U.S. 91, 98 ["Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together"].)

As our high court has explained: "Whereas the question whether a waiver is knowing and voluntary is directed at an evaluation of the defendant's state of mind," evaluating a subsequent "asserted invocation must include a consideration of the communicative aspect of the invocation — what would a *listener* understand to be the

defendant's meaning." (*People v. Williams* (2010) 49 Cal.4th 405, 428 (*Williams*).) The latter inquiry is an objective one. (*Ibid.*) Accordingly, in the postwaiver context, the "question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying." (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126.)

These considerations derive from *Davis v. United States* (1994) 512 U.S. 452, 459, where the Supreme Court held that to invoke the Fifth Amendment privilege not to incriminate oneself after it has been waived, and to halt police questioning after it has begun, the suspect "must unambiguously" assert his right to counsel. Consequently, it is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. (*Ibid.*) "[T]he suspect's subjective desire for counsel is not relevant." (*Nelson, supra,* 53 Cal.4th at p. 377.) The same is true for the right to silence. (*People v. Martinez* (2010) 47 Cal.4th 911, 947-948 (*Martinez*).) Faced with an equivocal or ambiguous statement, law enforcement officers *may* ask clarifying questions, but under *Miranda*, *supra*, 384 U.S. 436, they are not required to do so, nor must they cease questioning altogether. (*Davis, supra,* at pp. 459-462.) The issue is whether the objective circumstances show the defendant "intends to exercise [the] Fifth Amendment." (*Miranda, supra,* 384 U.S. at pp. 473-474.)

Davis recognized that "requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." (*Davis, supra,* 512 U.S. at p. 460.) But the court concluded the *Miranda* warnings themselves—when given to the suspect and validly waived before questioning—are "'sufficient to dispel whatever coercion is inherent in the interrogation process.'" (*Ibid.*)

The requirement of an unambiguous and unequivocal assertion applies equally to the right to counsel (*Davis, supra,* 512 U.S. at pp. 461-462) and to the right to

silence. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 381-382 (*Berghuis*); accord, *Martinez, supra*, 47 Cal.4th at pp. 947-949 [officers need not clarify whether defendant is invoking right to silence].) Thus, applying the reasonable-officer standard, *Davis* agreed with the lower courts that the petitioner's remark to investigators—"Maybe I should talk to a lawyer"—was not a clear and unambiguous assertion of the *Miranda* right to counsel. (*Davis*, at p. 462.) Likewise, in *Berghuis*, the high court determined that a suspect's silence for nearly three hours during a custodial interrogation did not reflect an unambiguous assertion of the *Miranda* right to silence. (*Berghuis*, at pp. 374, 381-382.)

Our Supreme Court has explained in the context of the right to counsel, with similar applicability to invoking the right to silence: "The rationale for requiring clarity is to protect lawful investigative activity, an obviously vital component of effective law enforcement. The [United States] Supreme Court has repeatedly emphasized that voluntary confessions are '"a proper element in law enforcement"' and '"'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"' [Citation.] Hence, after a suspect makes a valid waiver of the *Miranda* rights, the need for effective law enforcement weighs in favor of a bright-line rule that allows officers to continue questioning unless the suspect clearly invokes the right to counsel or right to silence. [¶] . . . When the interrogating officers 'reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," . . . because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.' [Citation.]" (*Nelson, supra*, 53 Cal.4th at pp. 377-378; accord, *Martinez, supra*, 47 Cal.4th at p. 949 [right to silence].)

Our high court also has explained that "'[a] defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to

discuss a particular subject covered by the questioning.' [Citations.]" (*Williams, supra,* 49 Cal.4th at p. 433-434.)

Thus, the court in *Williams* found the defendant had not intended to invoke his right to silence and terminate questioning in the following exchange: "[Officer] Salgado displayed a photograph of the victim to defendant, saying 'this is the woman I'm talking about. How did you meet her?' Defendant answered: 'I don't know that woman.' Salgado countered, 'I'm not saying that you know her. I know you don't know her.' Defendant confirmed: 'I don't know her.' Salgado replied: 'I know you don't know her. She was just someone you met that day.' Defendant repeated: 'I don't know her.' Salgado responded: 'I know you don't know her. I know that. You didn't know her. You didn't know her. I know that. How did you meet her that day?' Defendant responded: 'I don't know.' Salgado persisted: 'What did you do . . . that day with her? Why did . . . it turn [out] the way it did?' Defendant responded: '*I don't want to talk about it*.' [Italics added.] Salgado said: 'Tell me. David . . .' and defendant interjected: 'I did not know her.' Salgado said again, 'David why did it turn [out] that way?' Defendant again said: 'I did not know her.' Salgado replied: 'You don't know her, but why did it get that way? Why did she have . . .' and defendant interjected: 'I don't [*sic*] what you talk about. I didn't put nobody in no trunk.' He explained that he had nothing to do with the crimes. He continued to respond to questions and to deny all knowledge of or involvement in the crimes." (*Williams, supra,* 49 Cal.4th at p. 433.)

The Supreme Court in *Williams* concluded: "In our view, the statement italicized above — 'I don't want to talk about it' — was an expression of defendant's frustration with Salgado's failure to accept defendant's repeated insistence that he was not acquainted with the victim as proof that he had not encountered her on the night of the crime, rather than an unambiguous invocation of the right to remain silent. [Citations.] A reasonable officer could interpret defendant's statement as comprising part of his denial of any knowledge concerning the crime or the victim, rather than an effort to

terminate the interrogation. [Citation.]" (*Williams*, *supra*, 49 Cal.4th at p. 434, citing e.g., *Martinez, supra*, 47 Cal.4th 947-948; *People v. Stitely* (2005) 35 Cal.4th 514, 533-536 (*Stitely*); see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238, 1240 (*Musselwhite*) [comparable comments may evidence "'only momentary frustration and animosity'"].)

In light of the foregoing authorities, we turn to defendant's asserted invocation of his right to silence here. "'In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained.'" (*Martinez*, *supra*, 47 Cal.4th at p. 949.)

2. In Context, Defendant's Statements Reflect Aggravation and Frustration about Repeated Gang Allegations, Not an Intent to Terminate the Interview

a. Defendant's Statements

Defendant contends he unequivocally invoked his right to silence about an hour into his interview with Investigator Mike Brown of the Anaheim Police Department. Brown had begun the interview by noting he was in the department's gang unit, then stated, "Okay, I'm going to read your rights before we go [to] any questions." Defendant does not dispute Brown properly informed him of his *Miranda* rights, nor does defendant suggest he did not understand or validly waive his rights before the interview proceeded. Instead, from the outset of the interview he seemed most concerned about gang issues, including potential gang allegations.

He acknowledged he knew of the "incident that happened in the alley" on January 15th, and when Brown asked, "What do you know about that night," defendant answered, "Not much man but I know it ain[]'t no gang problem, don't know why you need [the] gang unit." Brown responded, "You're a Westside guy, right, or used to be at

least," and while defendant acknowledged his former affiliation, he denied he was "still from Westside."

The interview reflects that defendant wanted to convey to Brown that while he witnessed an assault on Castaneda in the alley, he was only present as a bystander until the man who stabbed Castaneda demanded that defendant drive him away from the scene. Defendant claimed he had only stopped at his mother's home to charge his cell phone, and when he returned to his car in the alley, the victim, whom he knew from a previous encounter possessed a gun, began issuing gang challenges, including accusing defendant of being an Eastside gang member. The victim also insulted those who lived near the alley as alleged "paisas" or illegal immigrants, and had been doing so "all[] day I guess," according to defendant, as "he did the other day with me."

Defendant further explained that when the victim continued to spout "stupid shit, you know, childish shit," another man in the alley suddenly "socked [h]im" and "wouldn't leave [the victim] alone [until] after he was all bloody and shit." According to defendant, "I was tripping out like what the fuck," and then "[t]hat fool came towards me too," "I was oh, fuck man," "I see him all bloody and shit," "It's traumatizing man," and "[t]he fool's like give me a ride, hurry up, let's go." Defendant "could see something in his hand too," and he did not know if it was a gun or knife or other sharp object, so he complied and drove the man away as directed.

But over the next hour in the police interview, in addition to exploring defendant's version of the incident, including by having him draw a map of the alley, Brown also pressed defendant repeatedly on the topic of his own gang involvement. This latter tack culminated in Brown alerting defendant the victim had survived a knife attack in the alley, and then accusing defendant: "You know? You know what I think happened? I think maybe you're in bad graces [with Westside, so another Westside member in the alley] starts to get in [a] fight with this dude [i.e., the victim] . . . , you know maybe he gives you the knife [and] tells you that's your way [to] get back in

Westside, get back in good graces." When defendant answered, "Absolutely not" and "Never bro," Brown asked skeptically, "You never committed a crime with Westside before?" Brown brushed defendant's denial ("Nuh-uh") aside, and appeared ready to probe further in his scrutiny of defendant's gang ties, stating, "What else[,] let's do it this way."

At that point, after Brown had pressed defendant throughout the interview about his former and allegedly continuing gang involvement, defendant stated, "Ok we are going [*sic*]. I'm done talking. You['re] calling me a liar. I'm just the . . . ." Brown interjected, "No, I'm . . . ," but then the record indicates both men spoke at the same time, with defendant stating, "No, no, no, no, I'm done. I'm serious," and Brown protesting, "I'm not calling you a liar. I'm trying to get the story straight."

Defendant answered, "That's it. I'm done," and when Brown asked, "You don't want to talk anymore," defendant seemed to indicate he wanted to speak only of his version of the incident, not any gang matters. The video recording of the interview reflects that defendant remained engaged in the interview; he did not cross his arms or turn away from Brown, but instead stayed focused on him as he clarified, "I told you what you needed to know. You ask[ed] me to. Now, you're telling me different, a different story. No, I'm happy for the guy [i.e., the victim's survival] but I'm not happy what you['re] telling me now." When Brown apologized, "I'm just trying to do my job, David. I'm not trying to piss you off," defendant leaned forward towards Brown and explained his outburst: "And I'm telling you over and over . . . . I ain't involved with gangs. I can't stand that shit man. It pissed me off like I told you[;] why would they tag [graffiti] all, all through that alley [where his mother lived], all the time hang out to disrespect that shit over and over. If I was a . . . Westside gang member, they would not do that. They would not do that, they will have respect."

Brown perceived a willingness to continue the interview in defendant's explanation that he was "pissed" at Brown's Westside insinuations because, far from

being sympathetic to or a member of the gang, he was angry at Westside for "disrespect[ing]" the alley where his mother lived. The pair discussed defendant's further attempts to distance himself from Westside for a few more minutes until Officer Julissa Trapp relieved Brown. Defendant continued to speak with Trapp for approximately another hour, and during that time admitted he stabbed Castaneda "twice" because Castaneda threatened defendant's family.

b. The Trial Court's Ruling

The trial court rejected defendant's pretrial motion to suppress his statements. After reviewing the transcript and video recording of the interview "as to whether or not he invoked" the right to silence, the trial court explained: "[I]t's one thing to read it, it's another to see it [and] listen to it, and . . . the court did both in order to put it in its proper context. [¶] So was it an indication? Was it a clear and [un]equivocal statement of 'I'm done,' . . . indicating to Officer Brown that he [sh]ould immediately desist [from] questioning him?

"And the court is going to find no, . . . it was not. It was ambiguous. It wasn't necessarily equivocal [*sic*? Unequivocal?]. It was certainly of [an emotional] state that warranted and allowed the officer to at least seek . . . clarification when the defendant said he was done talking."

The trial court observed that when Brown asked "you don't want to talk anymore," the result was "the conversation continued on." The court concluded, "This appeared to be an expression of unhappiness as to one small little piece of this interview puzzle, which was the defendant's continuing denial of gang involvement or anything with Westside[.]"

The trial court viewed defendant's outburst or "expression of unhappiness" as "in line with some of the cases cited by the People" for the proposition that "it was not an invocation when the defendant said, quote, I don't know if I want to talk anymore,

unquote." The court acknowledged "maybe Mr. Sanchez's statement goes a tad bit further than that, maybe it doesn't; but, again, the court doesn't find anything wrong at least in the officer clarifying," in light of defendant's emotional state.

In particular, the trial court "also looked at and read and considered" *People v. Rundle* (2008) 43 Cal.4th 76, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, and cited in *Williams, supra,* 49 Cal.4th at pp. 433-434. The court noted as "on-point" the Supreme Court's holding that "a defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the officer or amounted to a refusal to discuss a particular subject covered by questioning." (See *Williams, supra,* 49 Cal.4th at pp. 433-434.)

The trial court concluded as to defendant's asserted invocation: "I think what you see on page 71, it's . . . an expression of a passing frustration with the officer in pursuing some type of a gang affiliation where the defendant repeatedly says 'no, there is no gang affiliation. [¶] It's a frustration borne of, I guess, beating a dead horse senseless in regards to one small particular subject matter that was covered by the . . . officer[,] rather than the whole process itself. I think the remainder of the continuing discussion that Mr. Sanchez had [with] the officer certainly bears witness to the fact that he did not invoke."

c. The Trial Court Did Not Err in Admitting Defendant's Statements

At first blush and considered in isolation, defendant's statements in rapid succession in his interview ("I'm done talking. You['re] calling me a liar," "I'm done. I'm serious," and "That's it. . . . I'm done") appear to invoke the right to silence he had waived at the outset of the interview. But as our Supreme Court explained in *Williams,* "In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends. In those instances, the protective

purpose of the *Miranda* rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant." (*Williams, supra*, 49 Cal.4th at p. 429.)

Williams and ample authority from our high court also hold that "'expressions of passing frustration or animosity'" toward officers do not invoke the right to silence. (*Williams, supra*, 49 Cal.4th at p. 433; see, e.g., *Martinez, supra*, 47 Cal.4th 947-948; *Stitely, supra*, 35 Cal.4th at pp. 533-536; *Musselwhite, supra*, 17 Cal.4th at pp. 1238, 1240; see also *People v. Jennings* (1988) 46 Cal.3d at 963, 977-978 ["'I'm not going to talk,'" and "'That's it. I shut up,'" reflected "only momentary frustration and animosity" toward the questioning officer].)

Here, a reasonable officer in Brown's position could have some doubt about whether defendant was invoking his right against self-incrimination in an effort to terminate the entire interrogation or was finally expressing pent-up frustration at Brown's line of gang questioning, including his seeming insistence defendant belonged to the Westside gang despite defendant's denials. Consistent with the latter interpretation, Brown soon left the interview room and was replaced by Trapp, who did not press defendant on his alleged gang ties.

Before he left, and indeed immediately on the heels of defendant's potential invocation, Brown clarified defendant's actual intent ("You don't want to talk anymore?"), a clarification the high court has held is legitimate and proper police practice, but not required. (*Davis, supra*, 512 U.S. at pp. 461-462.) Defendant could have responded with a definitive invocation, but instead explained why he was "pissed" at Brown and gave every indication in further discussing the alley incident that the interview could continue if Brown avoided questions about defendant's gang involvement.

"A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.'

[Citation.]" (*People v. Silva* (1988) 45 Cal.3d 604, 629-630 [trial court properly concluded defendant's statement, "'I really don't want to talk about that,'" "'*was not even intimating he wished to terminate the interrogation*,'" original italics].) Viewing the video recording of the interview, and observing defendant's demeanor before, during, and after the statements on which he now relies, and considering the context in which he made the statements, we conclude they reflect only momentary frustration and animosity toward Brown. The trial court, also having viewed the recording, reasonably could conclude defendant intended only to deflect or end Brown's focus on defendant's gang ties, but did not want to terminate the interview, and instead sought to continue minimizing his culpability by explaining his presence and actions in the alley. Consequently, the trial court did not err in denying defendant's suppression motion.

B. *The Trial Court Mistakenly Believed the GBI Enhancement Was Mandatory, But Remand Is Unnecessary*

Based on the probation officer's report, the trial court at the outset of the sentencing hearing stated, "[W]e're all in agreement that section 12022.7, the GBI enhancement, is [a] mandatory consecutive [sentence] of three years." The Supreme Court, however, has specified that a trial court may strike a GBI enhancement in the interests of justice under section 1385, no different than most other enhancements. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155.) It should exercise its discretion to do so only "'if it determines that there are circumstances in mitigation of the additional punishment.'" (*People v. Luckett* (1996) 48 Cal.App.4th 1214, 1218.)

Remand is unnecessary where it is not reasonably probable the trial court would strike an enhancement allegation or sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 729; *People v. Bravot* (1986) 183 Cal.App.3d 93, 98.) That is the case here, where the court observed that defendant's conduct was "incredibly violent" and

that, instead of calling 911 or taking other steps if he believed his family faced a true threat from Castaneda, he inflicted grievous and permanent injury of the victim, paralyzing him below the waist and thereby significantly diminishing his quality of life and likely his life expectancy.

Defendant suggests remand is necessary because the trial court "gave serious consideration to striking the ten year gang enhancement, although it ultimately decided not to dismiss that enhancement." But the court expressly explained it "cannot and does not find that this is an unusual case, that justice would best be served in striking that additional [gang] punishment."

The court observed that while defendant had lived crime-free for almost four years and had a deep concern for his family, including a son with special needs, his adult criminal record showed increasing seriousness since several sustained juvenile petitions. He may have claimed in his interview he was "tired of this [gang] lifestyle," but the court observed he was "not — obviously not tired enough to avoid trouble." At age 24, his gang "loyalties" or "something else from within . . . just flip[ped] like a light switch," and defendant chose to chase and stab the victim multiple times and then run him over when fleeing in his car. True, the evidence of defendant's gang involvement was less obvious than the grievous nature of the GBI harm he inflicted on the victim. But the trial court found the former sufficient, and consequently there is no reasonable probability it would not find the latter also warranted punishment.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.